HIGH COURT OF DELHI : NEW DELHI

O.M.P. No. 401/2006

Judgment reserved on: May 2nd, 2007
Judgment delivered on: November 14, 2007.

Sh. Jagatjit Jaiswal & Anr. ..... Plaintiffs
! Through: Mr. P.V. Kapur, Mr. Shyam Divan, Sr. Advocates with Mr. Asim Vachher and Mr. Achal Gupta, Advocates

versus

$ Karmajit Singh Jaiswal & Anr. ..... Defendants
^ Through: Mr. Arun Jaitley, Sr. Advocate with Mr. Rajiv Endlaw, Ms. Malini Sud, Mr. Aman Leekha and Ms. Ashu, Advocates.

***CORAM:**

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J.

1. In this petition under Section 9 of the Arbitration and Conciliation Act, 1996 (referred to as `the Act' hereinafter), the preliminary objection raised by the respondents before me that needs to be determined is, whether Clause 9 of a Memorandum of Family Settle-

ment (MOFS) dated 3.3.2000 entered into between the parties tantamount to an arbitration agreement. If it contains an Arbitration Agreement, as contended by the petitioners, the present petition would be maintainable, but if it does not contain an Arbitration Agreement as argued by the Respondents, the present petition would fail as not being maintainable.

2. The facts giving rise to the present petition insofar as they are necessary to determine the preliminary issue may be noted. The Petitioner No. 1 and the Respondent No. 1 are brothers and the sons of Late Mr. L.P. Jaiswal. Further, Petitioner No. 2 and Respondent No. 2 are the wives of Petitioner No. 1 and Respondent No. 1 respectively.

3. Late Mr. L.P. Jaiswal founded M/s Jagatjit Industries Ltd. in the year 1944. The petitioner being one of the sons of late Shri L.P. Jaiswal headed the management of the said company since 1977. However, it appears that in the year 1999 disputes arose between the family members of late Shri L.P. Jaiswal including petitioner No.1 and respondent No.1. Litigation was initiated in this Court as well as courts in Kapurthala in the year 2000. However, these suits came to be withdrawn in November, 2003. The petitioners state that the withdrawal of the suits was prompted by, inter alia, an oral agreement reached between the parties herein on 2.3.2000 which was later reduced to writing as the MOFS on 3.3.2000. Petitioner No.1 Mr. Jagatjit Jaiswal and

his wife on the one hand, and respondent No.1 Mr. Karamjit S. Jaiswal and his wife on the other hand, represented themselves and their family members respectively in the MOFS and were referred to as JJ Family Group and KSJ Family group respectively.

4. As per the recitals contained in the MOFS, as per an oral settlement within the L.P. Jaiswal family, 14 companies scheduled therewith had fallen to the share of the parties, which included M/s Jagatjit Industries Ltd. The same was entered into with an object to avoid disputes and litigation among the parties and to maintain peace, harmony and good relations among them. The MOFS records that the parties would hold equal shares in the 14 companies listed in the MOFS. They would jointly manage these companies and would enjoy equal benefits, rights and privileges. Neither party would exclude the other, either directly or indirectly from the joint management or equal benefits. The public limited companies were to be managed professionally with the assistance of professional managers, who were to be appointed by the mutual agreement of petitioner No.1 and respondent No.1. Even their duties and responsibilities were to be assigned by mutual agreement of petitioner No.1 and respondent No.1. They also agreed to formation of an Audit Committee, of which both of them would also be members, to jointly supervise and control the management of the said companies. The MOFS provided for the equal representation of the parties on the Board of Directors of the companies, appointment of in-

dependent directors, and put restrictions on the two groups to mortgage, pledge, transfer or dispose off the shares of the companies or to do any act which would result in the dilution of the equal control of the two group in the companies listed in the MOFS.

5. The MOFS also contained clause 9 whereby a Dispute Resolution Committee (DRC) was to be constituted. The said clause which calls for interpretation, reads as follows:

> *9. The Parties agreed to nominate and constitute a committee hereinafter to be referred to as the Dispute Resolution Committee comprising of persons acceptable to them. It is agreed that the Parties shall be bound to refer all disputes between them relating to any matter or dealings between the Parties that have any connection to the affairs of any of the Companies or otherwise and the decision of the Committee shall be final and binding on the Parties. The Parties agreed and undertook to abide by all decisions of the Committee whether the Committee chooses to act as arbitrator or as umpire or referee. Accordingly, the Parties have agreed not to take recourse to litigation to resolve disputes or differences between them.*

6. It appears that late Shri L.P.Jaiswal, who was the majority stake holder in Jagatjit Industries Ltd. decided to divest Petitioner No.1 from the management of the said company and to institute Respondent No.1 at the helm of its affairs. He wrote a letter dated 10.8.2001 expressing his decision in this regard. The petitioner No.1 thereafter gave up the stewardship of the said company. A Memorandum of Understanding (MOU) was also executed between Shri L.P.

Jaiswal and Respondent No.1 on 7.10.2003, whereby it was agreed to reconstitute the Board of Directors of Jagatjit Industries Ltd. Petitioner No.1 was not in the reconstituted Board of Directors, while Respondent No.1 became the Managing Director of the said company. According to the petitioners, the continued status quo with regard to their rights and privileges till sometime in the year 2006, and they did not apprehend that the Respondents would not honour the MOFS dated 3.3.2000.

7. However, thereafter it appears that aggrieved by the threatened withdrawal of the various rights, privileges and benefits being enjoyed by petitioner No.1, which he was enjoying while in the management of M/s Jagatjit Industries Ltd and also threatened by various subsequent developments which had the effect of unsettling the equilibrium sought to be established by the MOFS dated 3.3.2000, the petitioner filed this petition under Section 9 of the Arbitration and Conciliation Act to seek various interim protections and reliefs.

8. Since the objection to the maintainability of this petition has been raised by the respondent I may first notice the same.

Respondents Contentions

9. This Court acting under Section 9 of the Act can only exercise jurisdiction once it is satisfied as to the existence of a valid Arbitration Agreement. Reliance has been placed by Mr. Jaitley, learned se-

nior counsel appearing for the respondents on the judgment of the Supreme Court in *S.B.P and Company v. Patel Engineering Limited 2005 (8) SCC 618*. The Court in para 19 held as follows:

> ".....Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement...."

10. The said clause 9 of the MOFS does not constitute an Arbitration Agreement, as it does not specifically require the appointment of an Arbitrator(s). The said clause envisages the appointment of a Dispute Resolution Committee (DRC) and it is upto the Committee to decide whether to function as arbitrators, or as Umpires or Referees. For it to be an arbitration agreement, the agreement should be clear and unequivocal, and the intention should only be to finally settle the disputes only through the route of arbitration. The choice to act as arbitrators or as umpires or referees can only be with the parties and not vest with the appointees, as provided for in clause 9.

11. The expressions in the said clause 9 of the MOFS namely “Arbitrators” on the one hand and “Umpire” and “Referee” on the other hand have different meanings and connotations in law. When the DRC has been vested with the discretion to choose to act as “Arbitrators” or as “Umpires or Referees”, then it cannot mean that the three expressions have one and the same meaning i.e. to act as “Arbitrators” alone. Parties consciously used different expressions, i.e., “arbitrators” on the one hand and “umpires and referees” on the other hand to provide a “choice” to the DRC to either act as “arbitrators” or in the contradistinction as “umpires or referees”. The term “Referees” has a settled meaning and is said to mean a person to whom parties to a dispute refer the matter for admission and whose statement on the dispute is binding on the parties as an admission. The concept of a “Referee” as elucidated by the Supreme Court in *Hira Chand Kothari v. State of Rajasthan (1985) Supp SCC 17* is relied upon. It is argued that the term “Umpire” though has been used extensively under the Arbitration Act, 1940 but an “Umpire” is not an “Arbitrator” in the sense that he is not required to undertake any quasi-judicial proceedings. The expression “Umpire or referee” has to be understood as in a game, i.e. where they are trusted to come up with a fair and honest decision on the basis of their expertise of the game and observations on the conduct of the parties and the ground realities.

12. Since the DRC had the freedom to choose whether to act as Arbitrator, or as Umpires or Referees in the event they chose to act as Arbitrators, then the provisions of the Act would be applicable, whereas in case they choose to act as Referees then provisions of Section 20 of the Evidence Act would apply, and if they decide to act as Umpires, then the parties agree to be bound by their decision.

13. Respondents also place reliance on clauses 10 and 12 of the MOU dated 03.03.2000, to contend that from the clauses it is apparent that the scope of the decisions of the DRC was not to finally resolve all disputes between the parties arising under the MOFS. The said clauses read as follows:

> "10. In the event of a breakdown of relationship between the parties representing the two family groups, it is agreed that all the companies shall be equally divided between the parties in a manner as agreed and finalized by the Dispute Resolution Committee. The decision of the Committee to divide the companies equally between the parties, either by reorganization of the companies or such other manner as it deems fit, shall be binding on the parties and it shall not be challenged in any court of law or otherwise.
>
> 12. The parties confirmed that they had entered into the above settlement with good intentions and will accordingly make all endeavours to conduct the affairs on the terms hereof. In the event of breakdown between the parties representing the two family groups and in the event of they are unable to resolve their differences amicably, it is agreed that the companies as also all assets and liabilities shall be split equally between the parties. For facilitat-

> ing such split the parties agreed to be entitled to get independent valuations from two reputable firms of Chartered Accountants. The parties agreed to be bound by the scheme of arrangement for split as determined by such experts. The decisions of the experts shall be final and shall not be subject to being challenged in any form or manner."

14. If the decision of the DRC was meant to be binding on the parties, then there would be no reason to provide for clauses 10 and 12, since there would be no occasion of a breakdown. The question of division of assets would only arise if the decisions of the DRC were not to be binding on the parties which could lead to a deadlock and a consequential breakdown. If the Committee's decision were binding, then the affairs of the companies would be run as per its decisions and the question of a breakdown would never arise. It is argued that it is only the manner of division which was to be finalized by the DRC under clause 10 and not the decision to divide the assets equally. Such a decision was already taken by the parties themselves. Furthermore, there exists an inconsistency in this regard also because even the manner of division by the DRC was not final, as clause 12 provides that for the facilitation of the split, the parties were entitled to get independent valuations from chartered accountant firms. It also provides that the parties agree to be bound by the scheme of arrangement for split as determined by such experts and that the decisions of experts shall be final and shall not be subject to being challenged in any form or manner. The only inference that one can draw from the said clauses

is that the Committee was to be a body entrusted with the task of suggesting solutions to iron out the day to day differences between the two groups.

15. A DRC comprising of one Mr. Gidwani, Mr. Majitha and Mr. Rajive was duly constituted and was know as the "well-wishers committee". The said "well-wishers committee" was formed for the purpose of resolving disputes, not as arbitrators, but, as mediators or conciliators. The said "well-wishers committee" was formed with the intent to guide the parties with regard to issues connected with the management of the 14 companies and cannot be considered as an Arbitral Tribunal. There is nothing to show that the "well-wishers committee" intended to act in a quasi- judicial manner. This Committee, once established, had worked itself out and consequently it abandoned its efforts after the execution of the letter dated 10.08.2001 by the Late Mr. L.P. Jaiswal wherein he handed over the management of Jagatjit Industries Limited to Respondent No. 1. Clause 9 had been invoked and it stood exhausted and a fresh DRC could not be constituted much less as an arbitral tribunal as there no longer existed an agreement much less an arbitration agreement between the parties.

16. The MOFS dated 03.03.2000 purporting to be a family settlement cannot be construed as one, as it was not signed by the Late Mr. L.P. Jaiswal, his wife Surjit Jaiswal and the major children of the parties namely Nishaat, Ruheen or Roshni. The premise on which

the MOFS was entered into was that the 14 companies were to fall to the share of the parties. At the relevant time, the companies were controlled and largely owned by the Late Mr. L.P. Jaiswal and that the Petitioners and Respondents held barely 5.3% of the shareholding of Jagatjit Industries Limited. Furthermore, in light of the letter dated 10.08.2001 handing over control and management of Jagatjit Industries Limited to Respondent No. 1 and subsequently the MOU dated 07.10.2003 executed between Late Mr. L.P. Jaiswal and Respondent No. 1 wherein the Respondent No. 1 was given exclusive management of Jagatjit Industries Limited, the MOU dated 03.03.2000 was never acted upon and was given a complete go by from 10.08.2001 onwards.

17. The said clause 9 is vague and cannot be the basis of an arbitration or an interim order of protection under Section 9 of the Act. Reliance has been placed upon (2000) 4 SCC 272; Section 573; 1999 JT(1) SC 97; AIR 1955 Nag 126. Various other decisions have also been relied upon by the respondents and they would be referred to in the course of my discussion and decision in the matter.

Petitioners' contentions

18. Under the said MOFS in clause 9 the parties in order to avoid litigation agreed to establish a DRC comprising of persons who would be mutually acceptable to them. This is clear from the language of the said clause which provides "*the parties shall be bound to refer*

all disputes relating to any matter or dealings between the parties that have any connection to the affairs of any of the companies or otherwise". Furthermore, finality was to attach to the decision of the Committee so constituted. Thus, the intention of the parties was to resort to alternate dispute resolution method by way of arbitration proceedings. The wordings of the said clause do not leave room for any ambiguity inasmuch as, it uses the words "*whether the committee chooses to act as arbitrator or as umpire or referee"*. It is the Petitioners stand that the term "arbitrator" is synonymous with the terms "referee" or "umpire". The said clause 9 of the MOFS has to be read to mean that the DRC has to function as an arbitral tribunal.

19. The Committee was to have a continuous existence for deciding disputes as and when they arose and was not to be exhausted by a one-time reference. Thus, all future disputes as and when they were to arise between the parties were necessarily to be referred for settlement by way arbitration to the DRC.

20. In his rejoinder, learned senior counsel for the petitioner, Mr. Shyam Deewan submitted that under Section 9 only a prima facie determination on existence of arbitration agreement is required. It was further submitted that the "well wishers Committee" was constituted by "Rajive" and not by the parties. A "Well Wishers Committee" is not contemplated by the said clause 9 and hence, the same cannot be said to have been constituted under the said clause. Even other-

wise, the right to refer disputes to a DRC does not get exhausted merely because one committee had been formed under the clause. The said clause covers to all disputes which may arise between the parties in future under the MOFS. Since, the words used in the said clause unequivocally proscribe resort to litigation, and mandates that the parties are bound to refer their disputes to the Committee, whose decision is final and binding on the parties, the decisions relied upon by the respondent were distinguishable on facts. The petitioners have also relied on various decisions which would be referred to and dealt with by me presently.

Discussion and Decision:-

21. Before proceeding to deal with the issue pertaining to existence of arbitration agreement between the parties, it may be pointed out that Mr. P. V. Kapur, learned senior counsel appearing for the petitioner had initially argued that this court while dealing with a petition under Section 9 of the Act cannot go into the question of existence/validity of the arbitration agreement. That determination can be made by the Court only while dealing with an application under Section 11 or Section 8 of the Act. Reliance had been placed upon para 12 of the judgment in ***SBP (supra)*** to contend that since the jurisdiction of the tribunal to rule on its jurisdiction and existence of arbitration clause under Section 16 is not taken away, except when the Tribunal has been constituted by intervention of the court, the court

while dealing with a petition under Section 9 cannot go into these issues which are for the Tribunal to decide.

22. However, subsequently, this submission was not pressed and request was made to decide the preliminary issue on the premise that the court is so empowered. Be that as it may, I am of the view that said contention was in any case fallacious, being in teeth of the observations of the Supreme Court in para 19 of the judgment in **SBP(supra)**, the relevant portion of which has been reproduced hereinabove, which envisages that the court has to decide upon the existence of the arbitration clause even while entertaining a petition under Section 9 of the Act, in case the existence of the arbitration agreement is challenged by the opposite party. This contention is, therefore, devoid of any merit and is rejected.

23. Clause 9 of the MOFS in effect states that the DRC may choose to act as an arbitrator or as umpire or referee. If the expression “umpire or referee” was also intended to be used to mean only an “arbitrator”, Clause 9 would constitute an arbitration agreement. On the other hand, if the said expression was intended to enable the DRC to act in some other capacity, other than as an “arbitrator”, the question would be, whether the said clause is vague and uncertain and therefore, not a binding arbitration agreement. I may add that it is not the Respondents contention that the expression 'arbitrator' used in clause 9 of the MOFS was intended not to mean an

arbitrator as understood in the law of Arbitration. Therefore, it is important to construe the expression "umpire or referee" used in clause 9 of the MOFS to decide the issue raised before me.

24. So, what are the rules of interpretation governing an arbitration agreement or an agreement which is claimed to be an arbitration agreement? In ***Ram Lal Jagan Nath V. Punjab State through Collector,*** AIR 1966 Punjab 436 the court expressed the rule of interpretation of arbitration agreements as follows:

> *"It is in this connection worth remembering that there is nothing peculiar or extra-ordinary about arbitration agreements and the same rules of construction and interpretation apply to such agreements as apply to agreements generally. The Court has thus to seek to give effect to the intention of the parties as evidenced by the agreement itself, without being over-technical in its interpretation. In endeavouring to collect the intention of the parties, the Court must consider the whole context, even though the immediate object of the inquiry be the meaning of an isolated clause. This basic legal position has not been controverted at the bar before us."*

25. In ***Ranjeet Combine vs. B.N. Khanna*** 2000 (6)AD(Delhi) 647 it was observed that the rules of construction and interpretation of arbitration agreement are the same as apply to agreements generally. The effort must be to give effect to the intention of the parties as evidenced by the agreement itself without being over-technical in its interpretation. In ***Union of India vs. D.M. Ravri & Co.***

AIR 1976 SC 2257 for interpretation of agreements generally, the Apex Court recommended the adoption of a common sense approach to interpretation, in contradistinction to a narrow pedantic and legalistic interpretation. In ***Polymat India(P) Ltd. vs. National Insurance Co. Ltd.*** (2005) 9 SCC 174 the Court interpreted the expressions used in the contract in question in the light of the context in which the expressions were used. Applying these principles, I proceed to examine clause 9 of the MOFS.

26. The plain grammatical construction first. The parties have consciously used the expression "...whether the committee **choses to act as ...**" and the expression "... as Arbitrator **or as** Umpire or Referee". If in clause 9, the expression "umpire or Referee" is substituted with the expression "Arbitrator", then it would follow that the parties intended to empower the DRC to *choose to act as "arbitrator" or "arbitrator"*. This does not make good sense. If the expression"umpire or referee" was used in the same sense as an 'arbitrator', there was no purpose of using the said expression at all, since the expression "arbitrator" had already been used and the same is clear enough to mean an arbitration under the law of arbitration, i.e., the Act. Moreover, what would happen to the '*choice*' available to the Committee? The said choice would be rendered nugatory and meaningless if word 'Arbitrator' and 'umpire or referee' were to mean one and the same thing i.e. 'Arbitrator'. The expression 'as arbitrator

or as umpire or referee' also shows that the parties intended to treat 'Arbitrator' as once species and 'umpire or referee' as the other. Since, the expression 'umpire or referee' is preceded by the expression 'or as', the expression 'as arbitrator or as umpire or referee' cannot be read as '"as Arbitrator or as umpire or as referee". Therefore, the DRC has the choice to function either as 'arbitrator' or as 'umpire or referee'. To understand the meaning of expression 'umpire or referee' as used in the clause 9 of the MOFS, one must also look to the dictionary meanings ascribed to the words 'umpire' and 'referee'.

27. No doubt the expression `umpire' and `referee' are also defined as synonyms of the expression `arbitrator'. However, that is not the only a dictionary meaning ascribed to these terms. For instance the word "referee" has been defined in the **Websters Third New International Dictionary** in the following manner.

> **referee**: one to whom a thing is referred: as a : a person to whom a matter (as a private bill) is referred by parliament to examine and report upon b(1): a person orig. in equity practice a master to whom a matter in dispute has been referred that he may settle it (2) : an attorney at law appointed to act as an officer of the court in determining or reporting on an issue referred to him in a pending proceeding or suit with or without the consent of the parties – distinguished from *arbitrator* (3) : a qualified person appointed by a judge in a juvenile or domestic relations case to investigate and report the facts and often to make recommendations 2 : an official in a sports contest usu. having final authority for administering the game. - compare Umpire

> referee 1. to administer (as a match, a game) as referee 2: to arbitrate (a dispute) as a judge or third party: to act as referee.

28. The same word in the **Random House Dictionary** of the English Language has been given the meaning:

> **ref.er.ee**:1.one to whom something is referred, esp. for decision or settlement; arbitrator. 2(in certain games and sports) a judge having functions fixed by the rules of the game or sport; umpire. 3.*Law*. a person selected by a court to take testimony in a case and return it to the court with recommendations as to the decision.-*v.t.* 4/ to preside over as referee; act as referee in.- *v.t.* 5. to act as referee. Syn.1.arbiter, See judge. 4. judge, umpire, arbitrate.l

29. Similarly the word “Umpire” has been described in the ***Websters (supra)*** in the following way:

> **Um-pire**: 1: one having authority to arbitrate and make a final decision: as **a** (1): an attorney at law appointed to judge a legal matter disputed by arbitrators (2)an impartial third party chosen by labor and management to arbitrate disputes arising under the terms of a labor agreement **b**: an official in a sport (as baseball or cricket) who rules on the plays **2**: a military officer who observes and evaluates training maneuvers....
>
> **Umpire**: to supervise and decide in the capacity of umpire <differences have to be... *umpired* by the president-Anthony Leviero> <can see... policemen umpiring the roughest games- Margaret Mead> ~ vi : to act in the capacity of umpire : Arbitrate <appointed to ~ in the labour disputes> <*umpired* for the California league -Darrell Berrigan>.

30. **The Random House Dictionary** defines the word "umpire" in the following way:

> **"Um.pire***: -n* **1**. a person selected to rule on the plays in a game. **2**.one selected to settle disputes about the application of settled rules or usages; a person agreed on by disputing parties to arbitrate their differences- *vt* to act as umpire in (a game). **4**. to decide or settle (a controversy, dispute, or the like) as umpire; arbitrate -*vi* **5**. to act as umpire."

31. One cannot loose sight of the fact that the MOFS was drawn up in the year 2000, i.e., much after the Act came into force in the year 1996. The expression "umpire" in the context of Arbitrations had therefore lost its significance, since, unlike the Arbitration Act, 1940, the Act did not provide for appointment of an "umpire". The parties, who are seasoned businessman, must have known the same, and this also points to use the expression "umpire" in a manner different from an "Arbitrator".

32. Consequently both the expressions 'umpire' and 'referee' have meanings which at times are different from 'arbitrator' as generally understood. They do not necessarily mean an arbitrator.

33. If the expression 'umpire or referee' does not mean 'arbitrator', and that expression has a different connotation, then the question arises as to what is the nature and scope of the functions of the DRC when it functions as 'umpire or referee'. I may now turn to

guidelines laid down and applied by the courts, containing the tests to be applied by the courts to determine whether the agreement is to refer the disputes to an arbitrator or to an expert.

34. In ***K.K.Modi v. K.N. Modi*** (1998) 3 SCC 573 the Supreme Court referred to *commercial Arbitration,* 2nd Edn. by ***Mustill and Boyd***, wherein the learned Author has observed that apart from arbitral Tribunals, in the complex modern state, there exist persons entrusted by consent with the power to affect the legal rights of two parties *inter se* in the manner creating legally enforcible rights, but intended to do so by a procedure of ministerial and not a judicial nature. Learned author lists some of the attributes which must be present for the existence of an arbitration agreement. The Supreme Court observed that the various listed considerations, that go into the making of the decision on the issue about the existence of the arbitration agreement, are not conclusive on the point. In paragraph 17 the Supreme Court listed some of the attributes, which must be present for the agreement to be considered as an arbitration agreement. The said paragraph reads as follows:

> "17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:
>
> (1)The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2)That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, **the terms of which make it clear that the process is to be an arbitration,**

(3)The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4)That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5)That the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6)The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal." (emphasis supplied)

35. The Supreme Court also observed that other factors which are relevant to determine the aforesaid issue include, *whether the agreement contemplates that the Tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward.* Another relevant factors noted by the Apex Court is *whether the wording of the agreement is consistent or in consistent with the view that the process was intended to be an arbitration.*

36. The issue as to whether a clause in an agreement constitutes an agreement to refer disputes to an Arbitrator or an expert has vexed the courts for long. In ***Hormusji V. Local Board, Karachi,*** AIR 1934 Sind 200 this dilemma, as expressed by Lord Esher M.R. in 56 LJQB 530 (3), was quoted and the proposition that merely because an agreement speaks of reference of dispute, it does not automatically become an Arbitration Agreement, was cited with approval. Lord Esher M.R. in the aforesaid English decision had observed :

> *"If it appears from the terms of the agreement, by which a matter is submitted to any person, that that which he is to do is to be in the nature of a judicial inquiry, and that the object is that he should hear the parties and decide the matter upon evidence to be led before him, there the person is an arbitrator. But if it appears that the object of appointing the person was not to settle differences after they had arisen, but to preclude differences from arising, there the person appointed is not an arbitrator. There is an intermediate class of cases in which a person is appointed to determine disputes after they have arisen, but is not bound to hear evidence or argument. In those cases it may be more difficult to say whether the person is a valuer or an arbitrator. They must be determined according to the circumstances in each particular instance by the intention of the parties. "*

37. In ***Bharat Bhushan Bansal V. U.P.Small Industries Corporation Ltd.*** (1999) 2 SCC 166 the Supreme Court interpreted clauses contained in a contract which reads as follows:

> "23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.
>
> 24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matters arising out of this contract and not specific ally mentioned herein."

The Apex court relied upon its earlier decision in ***K.K.Modi*** (supra) wherein the court had drawn out a distinction between determination by experts and that by arbitration. The Apex Court quoted with approval the following passage from page 164 of S.K.Chawla's *Law of Arbitration and Conciliation:*

> *"4. Arbitration agreement to be distinguished from agreement for decision by an engineer or expert.-Contracts may contain a clause that on certain questions the decision of an engineer,*

> *architect or another expert shall be final. The decision given in such cases by the engineer etc. is not an award. As pointed out by Bernstein, such a person is under no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own expertise and investigations. The procedure involved is not arbitration, and the Arbitration Act does not apply to it. The primary material on which such person acts is his own knowledge and experience, supplemented if he thinks fit by (i) his own investigation; and/or (ii) material (which need not conform to rules of `evidence') put up before him by either party. An arbitrator on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a less thorough investigation. Only one mind will be brought to bear on the problem. There will be no discovery of documents, there will not normally be an oral evidence' or oral submissions."*

The above clauses 23 and 24 were interpreted to imply a determination by the MD and the Executive Engineer on the basis of their own investigations and on the basis of the materials before them. According to the court, neither of the clauses, though they spoke of final and binding determination on the matters referred to the MD or the Executive Engineer, were held to be containing an arbitration agreement.

38. In ***K.K. Modi (Supra)*** in para 21 the Court laid down the guidelines to determine whether the reference was to an expert or to an arbitrator and the tests, *inter-alia*, were:

> (a) whether it was a case of existence of disputes which needed to be resolved by the Tribunal, or a case where the parties intended to avoid future disputes.
>
> (b) whether the Tribunal was intended to act judicially, i.e., after taking into account evidence and the submissions made before it in contra distinction to a decision arrived at on the expertise and knowledge of the Tribunal.

In para 33, the Court observed that the clause under consideration was calculated to clear any difficulties, which may arise, in the implementation of the settlement already arrived at and that the clause did not provide for any different decision than what stood agreed between the parties. The purport of the said clause was to prevent any further disputes between the family groups. Thus, no judicial determination was contemplated. The decision contemplated was held to be that by an expert and not by an arbitrator.

39. In ***M/s. Garg Builders & Engineers vs. U.P. Rajkiya Nirman Nigam Ltd. & Others***, AIR 1995 Delhi 111, this court was concerned with the interpretation of the following clause:

> *"In the event of any dispute arising out of any of the conditions of this agreement, the matter shall be referred to the then Unit. In-charge, whose decision shall be final and binding on both the parties."*

40. Even though the clause used the expression "*any dispute arising out of any of the conditions of this agreement*", the court held that the clause was only calculated to prevent disputes from

arising and was akin to a ‘finality clause’ making provision for decisions by an expert. No judicial determination of disputes was called for. The court held that mere agreement between the parties to be bound by the decision of a person does not constitute him as an arbitrator.

41. I may now examine clause 9 of the MOFS in the light of the context in which the parties inserted the said clause in the MOFS. The MOFS provided for the mechanism whereby both the groups agreed to hold equal shares and interest in the 14 listed companies, which they acknowledged had equally fallen to their share. This mechanism, inter alia, provided for the equal participation in the management and control of the 14 companies directly or indirectly. In the event of either party acquiring any shares in any of the companies, the same were to be held subject to the agreed terms as recorded in the MOFS and for the equal benefit of the parties. Clause 3 provided for joint management of the 14 companies and equal enjoyment of the benefits, rights and privileges by the parties. Neither party could exclude the other directly or indirectly from joint management or equal benefits. Under Clause 4 the parties agreed to manage the public limited companies with the assistance of professional managers who were to be appointed by mutual agreement between petitioner No.1 and respondent No.1. The duties and authorities of the professional managers were also to be assigned on terms agreed to between petitioner No.1 and respondent No.1. Further, on appointment of the

professional managers, an audit committee was to be constituted by petitioner No.1 and respondent No.1 of which they were to be members to jointly supervise and control the management of the companies. The parties agreed to be entitled to equal representation on the board of directors of the companies. Even the independent directors, if appointed, were to be with mutual consent. The parties also agreed that neither of them, and the groups they represent, could mortgage, assign or dispose of the shares of the said 14 companies without the concurrence of petitioner No.1 and respondent No.1 who had absolute right to refuse such permission. The parties agreed that neither of them shall do any act of omission or commission which would result in diluting the equal control of the two groups in the companies or otherwise pre-judicially effected their rights in the companies.

42. First and foremost, clause 9 is a part of a memorandum recording Family Settlement. This means, it is itself a culmination of the process of resolution of family disputes. One would therefore reasonably assume that the parties were looking to end existing disputes, and prevent future ones, and with that objective recording their terms of settlement in a memorandum.

43. Under the MOFS the parties agreed on fundamental issues i.e. their respective ownership, share and interests in the 14

listed companies. The mechanism drawn up under the MOFS appears to be a modality to recognize and put in to effect the aforesaid agreement of the parties. The parties provided the aforesaid mechanism to provide checks and balance in the implementation of the settlement contained in the MOFS and the DRC was constituted, inter-alia, for the purpose of preventing disputes from arising rather than just settling disputes which have arisen.

44. The DRC was expected to iron out the differences in the implementation of the MOFS to provide for a smooth run for the 14 companies and the relationship of the parties. To me it appears that the DRC was thought of as a body which would be required to handle and decide upon issues relating to the 14 companies insofar as they touched upon, inter alia, the management of the companies, the enjoyment of benefit, rights and privileges of the two groups, the appointment of and discharge of duties by the professional managers, joint supervision and control of the management of the companies by the audit committee, right of equal representation on the board of directors of the companies etc. From the opening words of clause 9 it would appear that such like disputes and differences were foreseen by the parties, as arising from time to time, to be resolved by the DRC.

45. It appears that the parties agreed to nominate and constitute the DRC as a *standing committee* with a view to refer disputes and differences that may arise between the parties, i.e.,

between the JJ Family Group (The petitioners' group) and the KSJ Family Group (The respondents group); The constitution of the DRC is postulated even before any disputes or difference arise between the parties, and the formation of this committee is not triggered upon the arising of any disputes or differences. In so resolving these disputes and differences, in my view the parties contemplated that the DRC would have the discretion to choose to act either in the capacity of "arbitrator" or in the capacity of "umpire or referee", i.e. as an expert. That choice was left to the discretion of the DRC, i.e., whether to act as 'arbitrator' or as 'umpire or referee', depending on the nature of the dispute. It cannot be said that all disputes and differences were contemplated to be arbitrated upon before the DRC for the simple reason that such disputes may arise from time to time and resort to arbitration on each and every such dispute would seriously impede and obstruct the efficient day to day management of the 14 companies.

46. While it is true that arbitration is thought of as a more expeditious forum of dispute resolution when compared to ordinary civil litigation or other statutory quasi judicial proceedings, since its procedure is also required to be in conformity with the principles of natural justice requiring the Tribunal to grant a hearing to the parties, take evidence (though the Arbitral Tribunal is not bound by the Evidence Act and the Civil Procedure Court), and then make a reasoned award on the basis of the submissions and evidence by

applying the law of the land, and its award is again open to challenge under the Act, its decision would certainly not be available as swiftly as that of an expert body. Delay in the availability of decisions, where they involve the management and control of the 14 companies could have led to serious stalemate or deadlock like situations. The parties were conscious of this aspect. Therefore, in my opinion, the expression `umpire or referee' is used in Clause 9 in the sense of an expert who takes a decision based on his own expertise in the relevant field and on the basis of his own observation of the relevant facts and circumstances. No doubt, while discharging its functions in either of the two capacities, the DRC was expected to act with fairness, and without any fear or favour to either party. However, the two expressions mean qualitatively different kinds of decision making processes and having different ramifications in law.

47. A perusal of Clauses 10 and 12 of the MOFS shows that in case there was a breakdown of relationship between representatives of the two family groups, it was agreed that all the companies shall be equally divided between the parties. If clause 9 of the MOFS postulated only the process of arbitration before the DRC, there would be no occasion for 'breakdown', since, whenever disputes and differences would arise, the same would be quasi judicially determined by the DRC. This is a further pointer to the fact that the DRC was not necessarily to arbitrate upon the disputes, but had the option to

choose to act as experts, depending on the nature of disputes and differences that arise from time to time between the two groups.

48. Clause 9 of the MOFS is very widely worded, since the scope of disputes and differences that may be taken to the DRC covers '*disputes between them relating to any matter or dealings between the parties that have any connection to the affairs of the any of the companies or otherwise*'. The parties were, it appears, conscious that a large variety of disputes and differences may arise between them from time to time, which may either be required to be arbitrated upon, or to be resolved by a Committee of experts.

49. In my view, both these expressions 'umpire' and 'referee' are used for experts like in relation to sporting games, wherein two parties agree to abide by the decision of the umpire/referee on each occasion the occasion arises in the course of the game, on the basis of his own observation, skill and knowledge and without going through the rigmarole of seeking explanation or giving reasons to the players, or giving them a hearing. In the present case, the rules of the games were contained in the MOFS. If a dispute arose in the course of the game, i.e. the implementation of the MOFS in the running of the 14 companies or otherwise, the same was agreed to be referred to the DRC and the parties agreed to be bound by its decision. Once referred, the DRC would decide whether to choose to act as

Arbitrator or as Umpire or Referee i.e. as expert. In the eventuality of the DRC acting as an Arbitrator, its procedure and determination would be governed by the provisions of the Act whereas in the eventuality of the DRC acting as an expert, its determination would continue to bind the parties but would not be enforceable as an Award of an Arbitral Tribunal. In the eventuality of either party not honoring the decision of the DRC given by them as experts, i.e. as 'umpire or referee', that could lead to a 'breakdown' situation, which would trigger the mechanism evolved in clause 10 and 12.

50. Since, the parties are now at loggerheads about the meaning of clause 9, it may also be worthwhile to analyse the communications exchanged between them on the subject to throw some light on the manner in which the parties understood the aforesaid Clause. The relevant extract of these communications starting from 30.9.2000 is, therefore, reproduced hereinbelow:

> On 10th October 2000, the petitioner No.1 wrote to respondent No.1:
>
> ***"We have agreed to joint management so that decisions are taken jointly. If we disagree then there is now a well-wishers committee of three persons above us formed to resolve the matter and give decisions.***
>
> *There are two issues on which you say I have a proprietory attitude. Not at all. I have objected to calling people individually as that will not only weaken the authority of the MD but will lead to politics among the staff. Today it is one person, tomorrow others and you can*

well imagine what will happen to the organization.

You say it is your right to do so. You also say it is our joint management, then surely the two of us must agree. As we do not as in this case then this matter should be referred to the well-wishers committee formed by Rajive for a decision.

51. On the same day, respondent No.1 responded to the aforesaid communication, inter alia, stating:

"As regards `the well-wishers Committee', this Committee has been talked about but has not been formally put in motion nor has held any meetings so far. ***If the Committee had been formulated and had been redressing and resolving our differences, then all the disputes that have arisen, would not still be in abeyance.***

Further I would like to point out that matters that have to be put up to the Committee, as and when it is formed, agreed upon, and in motion, will be matters related to policy and other major issues. My asking for the Head of Accounts of Hamira to visit me is not a matter which needs to be decided by the so called Committee. If you choose to object/obstruct to any routine step that I may take in exercising my right to joint management as you appear to be doing, for reasons I can't understand, then according to your logic all these matters will have to go to the Committee. This is not why the Committee was conceived and you know it."

52. On 13th October, 2000, petitioner No.1 again wrote to respondent No.1 as follows:

> *"With regard to the Well-Wishers' Committee, this was agreed to by you in September at a meeting you had with Rajive and Sati and after that when Dhanu was here at a meeting with Rajive and him. Subsequently I met Rajive alongwith Sati and also gave my concurrence.* ***Therefore, as far as I am concerned it is in operation from then.***
>
> *Earlier in March when the question of setting up a committee was discussed by Rajive and Sati at a joint meeting with us you had said that you were going to think about it. You have given your decision on the matter in September hence the delay in operations. There is of course the problem of Dhanu living in London which, you will appreciate, is an inconvenience in setting up frequent committee meetings. If you wish to consider some one from Delhi itself it will facilitate the matter.*
>
> ***The present dispute is not of a routine nature. It is a major policy matter pertaining to how two of us are going to exercise our rights of joint management of the Company. I do not agree with both of us exercising our rights independently giving separate sets of instructions to the Managing Director. I fail to understand how the Managing Director will operate with separate sets of instructions.***
>
> *.....*
> *I again reiterate that we can meet and resolve our disputes, failing which the same may be referred to the Well wishers' Committee. This committee meeting would have to be scheduled at the convenience of the three members- Sati, Dhanu and Rajive."*

53. From the aforesaid correspondence, it is evident that according to the petitioners, a “well wishers committee” was founded in terms of Clause 9 of the MOFS consisting of three persons, though the respondent does not share the same view. From the letters petitioner No.1 it appears that according to his understanding, issues of joint management which included even differences relating to the manner in which either petitioner No.1 or Respondent No. 1 may interact with the staff members of the companies were liable to be referred to the well-wishers i.e. DRC. According to him such like issues are major policy issues. Respondent No. 1 in his reply expressed his understanding that the Committee, as and when formed and put into motion, would decide on policy issues, and other trivial issues relating to management are not matters to be decided by the DRC.

54. From the aforesaid, it appears that both the parties understood the scope of reference to the DRC to include issues relating to management of the 14 companies, which they considered as related to policy and major issues. While, it may be argued that issues relating to management policies of the companies could form subject matter of reference to an arbitral Tribunal, at the same time it can reasonably be said that such disputes are suited for resolution by an expert body who understand day to day management affairs of businesses and companies. Such disputes are more likely to require pragmatic and business like approach rather then a quasi judicial determination.

Pertinently, the inter se rights have already been substantially declared in the MOFS. Therefore, in my view, even the understanding of the parties as evident from the aforesaid communications leads me to infer that they contemplated the DRC to function either as Arbitrators or as experts, described as 'umpire or referee'.

55. The next issue which arises for consideration is, what is the effect of clause 9 providing for an option to the DRC to either act as an Arbitrator or as an expert? In ***Wellington Associates Ltd(supra)*** the clause under consideration before the Court gave discretion to the party to file a suit to resort to arbitration. The Court held that since either of the forums could be approached by the parties there was no obligation to refer matters to arbitration and thus, there was no arbitration agreement. It was *"not the intention of the parties that arbitration is to be the sole remedy"*. Thus, unless there is a clear and unequivocal intention expressed in the written agreement, to resort to arbitration alone, an arbitration agreement does not comes into existence.

56. In ***Jagdish Chander V. Ramesh Chander and Ors***., C.A.No.4467/2002 decided on 26.4.2007, the Apex Court observed that-

> "(i) The intention of the parties to enter into an arbitration shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the

> part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. **Where there Is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement."**(emphasis supplied)

57. The decision in ***Chouthmal Jivrajjee Poddar V. Ramchandra Jivrajjee Poddar and Others***, AIR 1955 Nagpur 126 has been cited to contend that the reference is vague, inasmuch as, an Umpire is different from an Arbitrator, and a person cannot act as an Arbitrator or alternatively as an Umpire of a Committee on his own sweet will, and a reference which so permitted one to act as an arbitrator or an umpire was vague and invalid. The arbitration agreement in the said decision read as follows:-

> "An agreement to refer the dispute noted below to the arbitrators named (1) Shivprakashji Poddar of Hinganghat, (2) Balmukundji Poddar of Bombay, and (3) Nagarmalji Poddar of Pulgaon, Seth Nagarmalji Poddar being appointed as an umpire hereafter called the Committee."

58. Thus the agreement in ***Chouthmal (supra)*** though provided for three Arbitrators, the third was also appointed as Umpire. Since under the law at the relevant time, an Umpire was distinct from

an Arbitrator, inasmuch as, an Umpire was to act only if there was a difference between the Arbitrators themselves and not to sit as Arbitrator generally, the reference was held to be invalid as it appointed Nagarmal as Arbitrator as well as Umpire and not as a Sarpanch(presiding arbitrator) thus, giving him the mandate to act as both at his own sweet will.

59. In the present case, the DRC is not necessarily to act as an arbitral Tribunal. It could choose to act as an expert as well. Therefore, in my view, it is not open to the petitioner to enforce clause 9 of the MOFS as an arbitration agreement.

60. Though the other issues raised by the parties do not survive in view of my aforesaid finding, I am obliged to deal with them and accordingly I proceed to do so.

61. I will now proceed to deal with the Respondent's contention, based on the decision in ***M/s Teamco Private Ltd vs. T.M.S. Mani AIR 1967 Calcutta 168***, that since the said clause 9 comprehends that more than one person would constitute the tribunal, the same is vague, inasmuch as, the number of arbitrators to be appointed is not agreed to, and is void. It is pertinent to note that the said decision is based on the old law of arbitration (the 1940 Act) which is no longer in force. The court relied on the language employed in

Section 3 read with Rule 1 of the First Schedule to the Arbitration Act, 1940 which provided as:

> Rule 1:- ".....unless otherwise expressly provided the reference shall be to a sole arbitrator....."

62. The arbitration agreement in that case provided for reference to "arbitrators". Since the term "arbitrators" appearing in the plural form expressed a contrary intention, the court held that the reference could not have been to a sole arbitrator and the reference necessarily had to be made to a tribunal of more than one arbitrator and, since, no number was agreed to, the clause was vague and therefore void.

63. However, the Act deviates from the above trajectory and in contradistinction provides under Section 10 of the Act that :

> "Sec.10 Number of arbitrators. (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number."
>
> (2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitration."

64. Section 7 of the Act which lays down the essentials of an arbitration agreement does not suggest that an arbitration agreement must specify the number of arbitrators to be appointed. On a consideration of these provisions the Apex Court in ***MMTC vs.***

Sterlite Industries (India) Ltd. (1996) 6 SCC 716 held that *"the validity of an arbitration agreements does not depend on the number of arbitrators specified therein. The number of arbitrators is dealt with separately in Section 10 which is a part of machinery provision for the working of the arbitration agreement."* The words *"failing the determination"* indicate that this sub-section would come into operation where the parties have not agreed on the number of arbitrators. This contingency has been envisaged and taken care of by the legislature. Thus, failure to agree to a number of arbitrators would not render an arbitration agreement *void* and such an agreement has to be construed as envisaging reference to a sole arbitrator. Thus, this decision is of little assistance to the respondent.

65. Reliance has been placed upon ***Hirachand Kothari(dead) by Lr's V. State of Rajasthan and Another***, 1985(Supp.) Supreme Court Cases 17 to contend that the term referee in Clause 9 is to be understood as used in Section 20 of the Evidence Act. I find that the said judgment is not germane to the controversy before me. ***Ramji Lal v. Ram Sanchi***, AIR 1978 All 351 and ***Sadhu Ram & Ors.*** **V. Ude Ram,** AIR 1967 Punjab 179 12 (supra) have held that what is contemplated under Section 20 of Evidence Act is "information" from the referee in the form of a "statement". A determination by an expert or a judge resulting in a decision in not contemplated. Since, the clause before me contemplates a decision,

Section 20 of Evidence Act and the decision cited by the respondent have no relevance. In **Sadhu Ram** (supra)**,** the word “referee” was held to be used to imply appointment of an arbitrator since what was contemplated was a “decision” and not a “statement” (as contemplated by Section 20 of the Evidence Act). The reference was held to have been made for an “adjudication” and the decision an award by the Arbitrator. Therefore, term “referee” as used in the said clause 9 cannot be said to be used in the context/scheme envisaged by Section 20 of Evidence Act and in contra distinction refers to a decision to be arrived at by an expert.

66. The decision cited in ***Luxmi Chand Baijnath V. Kishanlal Sohanlal***, AIR 1955 Cal 588 Re: Arbn. ***Seth Kerorimal Adwani V. Union of India***, AIR 1959 Cal 430 and ***Delhi and Finance Housing and Construction Ltd V. Brij Mohan Shah and another*** AIR 1956 Punjab 205(at Delhi) are also not germane to the present controversy as there is no provision in clause 9 conferring jurisdiction on alternate tribunals for arbitration but only one DRC is contemplated in respected of a particular dispute, though it may act in different capacities at different times, depending on the nature of the dispute referred to it.

67. The decision in ***Hobbs Padgett & Co. vs. J.C. Kirkland Ltd. Lloyd's Law Reporter,*** 1969 (2) LLR 547 and ***Mangistaumunaigaz Ild Production vs. United World Trade Inc.,***

1995 (1) LLR 617, cited by the petitioner are of no avail. In both these cases, apart from the expression arbitrator/arbitration, no other expression was used. In Hobbs (supra), the arbitration clause merely stated 'suitable arbitration clause'. The court held that the said expression was sufficient to disclose the intention of the parties to refer their disputes under the agreement to arbitration. In ***Mangistaumunaigaz Ild Production (supra)*** the arbitration clause stated 'Arbitration, if any, by ICC Rules in London'. The same was interpreted to mean that in case any dispute arose, the same were intended to be taken to arbitration governed by ICC Rules to be held in London. The aforesaid cases do not in any way assist me in holding that the clause in question tantamount to only a binding arbitration agreement between the parties.

68. In view of my aforesaid finding that there is no binding or enforceable arbitration agreement between the parties, the inevitable conclusion which follows is that the present petition is itself not maintainable since the existence of a binding arbitration agreement is a *sine qua non* for the invocation of the jurisdiction of this court under Section 9 of the Act. Accordingly, I dismissed the present petition as not maintainable leaving the parties to bear their respective costs.

VIPIN SANGHI
JUDGE

November 14, 2007
Anuradha/P.K. Babbar